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California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re the Marriage of ARTHUR C. and FLORA A.
SAMORANO.

ARTHUR C. SAMORANO,

Respondent,

v.

FLORA A. SAMORANO,

Appellant.

C084143, C086540

(Super. Ct. No. 15FL04227)

MODIFICATION OF
OPINION

[NO CHANGE IN
JUDGMENT]

THE COURT:

On the court's own motion, it is ordered that the opinion filed herein on February 5, 2019, be modified as follows:

1. On page 4 in footnote 2, delete the final sentence which reads as follows: Neither party mentions this error.

The footnote shall now read:

2. The \$169,493 appears to be an error. The court indicated it was subtracting \$203,507 from \$370,000 which equals \$166,493.

This modification does not change the judgment.

FOR THE COURT:

_____/s/
Butz, Acting P. J.

_____/s/
Mauro, J.

_____/s/
Duarte, J.

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ARTHUR C. SAMORANO,

(Super. Ct. No. 15FL04227)

Respondent,

v.

FLORA A. SAMORANO,

Appellant.

The major issues in the dissolution of the marriage of Arthur and Flora Samorano were the division of real property, spousal support, attorney fees, and the allegation that Flora had breached her fiduciary duty by wiring money to her family in the Philippines without Arthur's knowledge.

Flora appeals from the judgment and two postjudgment orders.

As to the judgment, she contends the trial court erred in the handling of Arthur's separate property interest in two real properties, awarding Arthur spousal support, and finding that she breached her fiduciary duty.

As to the first postjudgment order, she contends the court abused its discretion in awarding Arthur attorney fees.

As to the second postjudgment order, she contends the trial court erred in denying her request to terminate spousal support and awarding Arthur additional attorney fees.

The record on appeal does not include a reporter's transcript of the trial or the hearings. The limited record restricts the issues we can review on appeal. On this judgment roll appeal, we assume the evidence at trial supported the trial court's findings.

Because Flora has failed to show an abuse of discretion in any of the trial court's rulings, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appeal Case No. C084143--The Judgment

Arthur and Flora were married in 2000 and separated in August 2015. They had no children. Arthur had retired before the marriage. At the time of dissolution, he was 72 years old and receiving \$2,795 a month in pension and social security. Flora was 61, worked at Kaiser as a dietary aide with a monthly salary of \$4,392, and had rental income of \$650 a month.

The couple owned two houses, one in Hayward and one in Elk Grove. Arthur had purchased the Hayward property for \$33,950 in 1976. In 2005 when its value was \$490,000, Arthur deeded the property to himself and Flora as joint tenants. They took out a \$120,000 loan, secured by a deed of trust on the property. The proceeds of the loan were used to pay off the existing loan and other loans used to improve the property.

In 2007 when the Hayward property had appreciated to \$510,000, the Samoranos refinanced the property. They took out a \$392,000 loan and received \$233,895 in cash

therefrom. They used \$203,570 of the cash as a down payment on the Elk Grove property, which they purchased for \$450,000, with a \$250,000 loan.

Arthur and Flora intended to sell the Hayward property and move to Elk Grove, but Flora was unable to find suitable work in Elk Grove. She stayed in Hayward and Arthur moved to Elk Grove. They each used their respective incomes to maintain their separate residences. Arthur's sister came to live with him and contributed \$350 a month to the household. Flora made changes to the Hayward property without a permit and rented out the garage and a shed. Her daughter rented one of the bedrooms in the house for \$650 a month.

In 2011 there was a loan modification on the Hayward property and the lender wrote off \$149,117 of the \$392,000 loan.

In August 2015 Arthur petitioned for dissolution of the marriage, requesting spousal support and attorney fees. The court ordered temporary support of \$1,303 to begin September 1, 2015, and awarded Arthur \$600 in attorney fees. Arthur's spousal support was modified to \$750 a month beginning April 1, 2016.

Before trial, Arthur requested continuing spousal support of \$750, the sale of the Hayward property, and all the Elk Grove property. He reasoned that since the down payment and all the mortgage payments on the Elk Grove property came from his separate property, his separate property contribution to the property exceeded the equity in it. Arthur also claimed Flora had embezzled over \$55,000 in community funds by sending cash to her relatives in the Philippines without his knowledge.

Flora claimed all the equity in the Hayward property was community property because the property's loss of value in 2010 wiped out Arthur's separate property contribution. She argued Arthur failed to provide evidence of his separate property contributions to either property. She claimed the amounts she sent to the Philippines were de minimis; much of the money wired came from her siblings. She further claimed Arthur knew about and encouraged the wire transfers, raising the defense of laches.

Trial was held in August and September of 2016. The parties stipulated the value of the Hayward property was \$460,000 and the value of the Elk Grove property was \$395,000. They further stipulated that neither the garage nor the shed at the Hayward property would be rented out.

The trial court issued a tentative decision in December 2016. The court found the Hayward property was Arthur's sole and separate property at marriage; it became community property in 2005. At that time Arthur's separate property contribution under Family Code section 2640¹ was \$370,000 (\$490,000 value less \$120,000 loan). With the 2007 refinancing, Arthur's contribution was reduced to \$169,493 because he used \$203,507 in loan proceeds to purchase the Elk Grove property.² The court ordered the Hayward property sold. From the proceeds, Arthur would first receive his \$169,493 contribution and other sums as an equalization payment; the balance would be divided between the parties.

In addition to the reimbursement for Arthur's contribution to the Hayward property, the court awarded other sums as an equalization payment. Since Flora received the vehicle with the greater value, Arthur was awarded \$868. Flora received a \$2,500 credit for a tax payment and a \$7,270 credit for one-half of the principal reduction on the real property loans. The court found Flora had made periodic transfers of money to relatives in the Philippines from 2001 to 2013. Arthur was unaware of these transfers. The total amount was \$44,419 with \$16,180 in interest. The court awarded Arthur one-half the total with interest or \$38,390. The total equalization payment to Arthur was \$198,981.

¹ Further undesignated statutory references are to the Family Code.

² The \$169,493 appears to be an error. The court indicated it was subtracting \$203,507 from \$370,000 which equals \$166,493. Neither party mentions this error.

The court found the down payment and all mortgage payments on the Elk Grove property were made from Arthur's separate property. Although the property was community property, Arthur's section 2640 right of reimbursement exceeded the equity in the property, so the court awarded the Elk Grove property to Arthur.

The court awarded spousal support to Arthur of \$277 a month, retroactive to January 1, 2016, beginning in January 1, 2017, and continuing until the death of either party, Arthur's remarriage, court order, written agreement of the parties, or the close of escrow on the Hayward property.

Flora appealed from the court's tentative decision on February 10, 2017, almost two weeks before the judgment was entered February 23, 2017. We will treat this premature notice of appeal as having been filed immediately after judgment. (Cal. Rules of Court, rule 8.308(c).)

Two Postjudgment Orders and Flora's Appeal of the First Order

During the summer of 2017, Arthur filed two requests for orders. In the first, he sought spousal support, noting the \$277 award had been suspended during appeal and he needed funds due to the delay in selling the Hayward property. He also sought \$3,000 in attorney fees. In the second, he requested an emergency order requiring the Hayward property be listed for sale as property values were declining. He alleged that Flora had refused to allow the realtor access to the property for six months, providing an email from the realtor supporting this claim. He sought an additional \$3,000 in attorney fees.

In September 2017 the court found changed circumstances allowing a review of spousal support and reserved the issue of attorney fees until trial. The court ordered Flora to cooperate with the viewing and assessing of the Hayward property and listing the property for sale.

Flora stipulated to signing documents for the close of escrow of the Hayward property and to vacate the property timely. The court granted both of Arthur's requests for \$3,000 in attorney fees. This award was based on both the disparity in the parties'

incomes and Flora's lack of compliance with the judgment, which caused Arthur to have to file requests for orders as he lacked funds. The attorney fee award was to be paid in \$250 monthly payments beginning December 2017.

Flora appealed from this postjudgment order for attorney fees.

This court granted Flora's request for an extension to file a consolidated brief for both appeals in case No. C084143.

Appeal Case No. C086540--Second Postjudgment Order

In November 2017 Flora moved to terminate the spousal support order that was retroactive to January 1, 2016, and began in January 1, 2017. She noted the judgment called for spousal support to end upon the close of escrow of the Hayward property and escrow had closed on November 17, 2017.

In response, Arthur requested spousal support of \$750 a month. He alleged Flora had not cooperated with the sale of the Hayward property and had not vacated timely. She had also failed to make three mortgage payments (that he had to make instead) and refused to pay the ordered attorney fees. Arthur requested that the court review the file to determine Flora's bad faith actions.

The trial court denied Flora's motion to terminate spousal support. It awarded Arthur \$1,500 in attorney fees, payable at \$250 a month. The court gave two bases for the fee award. First, it cited the disparity in the parties' incomes, Flora's ability to pay, and the reasonableness of the fee award. Second, the court awarded fees as a sanction pursuant to section 271. It found that Flora or her counsel or both had frustrated the policy of the law to promote settlement and reduce costs by encouraging cooperation and that the award was not an unreasonable burden on Flora.

Flora appealed from this order in appeal case No. C086540. We consolidated the two appeals.

DISCUSSION

I

Tracing Arthur's Separate Property Contributions

Flora contends the trial court erred in tracing Arthur's separate property contributions to both the Hayward and the Elk Grove properties.

"In the division of the community estate, . . . unless a party has made a written waiver of the right to reimbursement or has signed a writing that has the effect of a waiver, the party shall be reimbursed for the party's contributions to the acquisition of property of the community property estate to the extent the party traces the contributions to a separate property source. The amount reimbursed shall be without interest or adjustment for change in monetary values and may not exceed the net value of the property at the time of the division." (§ 2640, subd. (b).) "Separate property contributions are reimbursed before dividing the remaining community property." (*In re Marriage of Geraci* (2006) 144 Cal.App.4th 1278, 1286.) "[T]he legislative intent to permit full reimbursement for separate property contributions indicates that such contributions receive greater protection from depreciation than the community's interest, provided only that any appreciation in the value of a community asset above the amount of the separate property contributions to that asset belongs to the community." (*In re Marriage of Walrath* (1998) 17 Cal.4th 907, 924.)

"Whether the spouse claiming a separate property interest has adequately met his or her burden of tracing to a separate property source is a question of fact and the trial court's holding on the matter must be upheld if supported by substantial evidence." (*In re Marriage of Cochran* (2001) 87 Cal.App.4th 1050, 1057-1058.)

The record here consists of the clerk's transcript and exhibits. An appeal on "a record consisting of judgment roll and exhibits or other papers from the clerk's file without a reporter's transcript . . . 'must be treated as a judgment roll appeal, and only those facts appearing in the findings should or will be considered.' " (*Williams v.*

Inglewood Board of Realtors, Inc. (1963) 219 Cal.App.2d 479, 481 (*Williams*).) Flora “ ‘cannot broaden the scope of this court’s inquiry by incorporating in the clerk’s transcript the documentary evidence received in the court below.’ ” (*Id.* at p. 482.) We can consider only those matters appearing on the face of the judgment roll. (*Id.* at p. 483.) We presume substantial evidence supports the trial court’s findings. (*Id.* at p. 482.)

Flora’s argument appears not to challenge the sufficiency of the evidence, but instead the method used for tracing. She contends the court should consider the fluctuating value of real property throughout the marriage. She contends all the equity in the Hayward property was wiped out in the real estate market downturn, as shown by the 2011 loan modification in which a substantial amount of the outstanding loan was written off by the lender. Flora relies on *In re Marriage of Winn* (1979) 98 Cal.App.3d 363 (*Winn*).

In *Winn*, the husband owned a horse slaughter and auction business for many years before the marriage in 1971; in 1975 he declared bankruptcy, but thereafter resumed the business. (*Winn, supra*, 98 Cal.App.3d at p. 365.) At dissolution of the marriage, the trial court found the value of the business was \$15,000, all community property. The court gave the business to the husband and required him to give the wife a note for \$7,500. In upholding the judgment, the appellate court found it reasonable to conclude the value of the business at bankruptcy was zero and its present value was due solely to the husband’s efforts in reestablishing it after bankruptcy. (*Ibid.*) The court noted the value of a family business may be dependent on the goodwill based “on the personality and publicly recognized expertise of its principal owner.” (*Id.* at p. 366.)

Flora analogizes the economic downturn in the real estate market to the bankruptcy in *Winn*. We find the analogy unconvincing and *Winn* distinguishable because it involved a family business, not real estate. “The *Winn* decision must be limited to its facts; otherwise we can envision lengthy trials consumed by the introduction of exceedingly complex testimony concerning month-to-month fluctuations in the value

of an ongoing business.” (*In re Marriage of Denney* (1981) 115 Cal.App.3d 543, 550.) In *Winn*, the bankruptcy established the zero value of the business, a finding that was not challenged on appeal. Here, there is no evidence that the Hayward property lost all its value; there is no evidence as to its value in 2011 when the loan modification occurred. Further, the value of the business in *Winn* was dependent on the efforts of the husband and the goodwill associated with his efforts, expertise, and personality. Here, nothing suggests the value of the Hayward property was dependent at all on Arthur or his efforts. Beyond *Winn*, Flora provides no authority for her argument that in tracing a spouse’s separate property contributions to real property, the court is to consider market fluctuations during the marriage.

As to the Elk Grove property, Flora’s argument is murkier. She claims that tracing all the equity in the Elk Grove property to Arthur’s separate property contribution is inequitable because it gives him a windfall. Again, she analogizes to *Winn*, an analogy we have rejected. She cites *In re Marriage of Braud* (1996) 45 Cal.App.4th 797 for the proposition that section 2640 should not be followed when it would result in a windfall to one spouse. *Braud* involved allocating appreciation in a family home where there was a deferred sale until the children were grown. (*Braud*, at p. 821.) Flora fails to explain how this case is similar to *Braud* or why Arthur is receiving a windfall by receiving property where all the payments for the contested property came from Arthur’s separate property.

Flora has not established error in the trial court’s tracing of Arthur’s separate property contributions to the Hayward and Elk Grove properties.

II

Award of Spousal Support

Flora contends the trial court erred in awarding Arthur spousal support. In particular, she contends the court failed to balance the hardships as she lost her Hayward

home and Arthur received the Elk Grove property and a “windfall” from the Hayward property.

Section 4320 sets forth the circumstances a court is to consider in ordering spousal support. One circumstance is “the balance of hardships to each party.” (§ 4320, subd. (k).)

The deferential abuse of discretion standard governs appellate review of a spousal support order. (*In re Marriage of Ackerman* (2006) 146 Cal.App.4th 191, 197.)

Here, the trial court set forth at length its analysis of the section 4320 factors. It considered that Flora had a greater income and a lower monthly deficit of expenses exceeding income. It further considered that an equalization payment to Arthur would reduce or eliminate his need for spousal support. Accordingly, the court reduced spousal support to \$277 a month, to end upon close of escrow of the Hayward property.

Flora has failed to show an abuse of discretion in the spousal support order.

III

Breach of Fiduciary Duty

Flora contends the trial court erred in finding she breached her fiduciary duties with respect to handling community property by sending wire transfers of money to her family in the Philippines. Flora raises three grounds to defeat the court’s finding: laches, the statute of limitations, and that the amount she sent was minimal and should be treated as a gift to her family.

“The defense of laches requires unreasonable delay plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay.” (*Conti v. Board of Civil Service Commissioners* (1969) 1 Cal.3d 351, 359, fn. omitted.) Flora contends Arthur both knew about the wire transfers and encouraged them so his delay in complaining about them was unreasonable. The trial court found Arthur was unaware of the transfers. On a judgment roll appeal, we presume the evidence supports the trial court’s findings. (*Williams, supra*, 219 Cal.App.2d at p. 482.)

Generally, an action for breach of fiduciary duties between spouses must be commenced within three years of the petitioning spouse's actual knowledge of the transaction. (§ 1101, subd. (d)(1).) This time limit does not apply to an action in conjunction with an action for dissolution of marriage. (*Id.* at subd. (d)(2).) Flora's statute of limitations defense fails. First, the court found Arthur had no knowledge of the wire transfers when made, so Flora has not shown his actual knowledge was outside the statute of limitations. Second, the three-year statute of limitations does not apply in an action for dissolution of marriage. Third, Flora failed to raise the statute of limitations defense at trial. "The statute of limitations is an affirmative defense that is forfeited if not appropriately invoked by the defendant." (*Adams v. Paul* (1995) 11 Cal.4th 583, 597.)

Finally, Flora contends the amount she sent to her family in the Philippines was minimal. She claims most of the sums were sent by her siblings. The trial court found Flora's testimony on this point was not credible and found that she alone sent the money. We do not disturb the trial court's credibility determinations on appeal. (*Estate of Teel* (1944) 25 Cal.2d 520, 526.)

IV

Attorney Fee Awards

Flora challenges the two postjudgment awards of attorney fees. In case No. C084143, she challenges the November 2017 award of \$6,000 in fees (based on two requests for \$3,000 each). She contends she was only exercising her constitutional right to object in opposing Arthur's requests and the trial court failed to consider the disposition of the real property and the award of spousal support to Arthur. In case No. C086540, she challenges the January 2018 \$1,500 fee award, raising the same arguments.

"Pursuant to Family Code sections 2030 and 2032, the trial court is empowered to award fees and costs between the parties based on their relative circumstances in order to ensure parity of legal representation in the action. It is entitled to take into consideration the need for the award to enable each party to have sufficient financial resources to

present his or her case adequately. In assessing a party's relative need and the other party's ability to pay, it is to take into account “ ‘all evidence concerning the parties' current incomes, assets, and abilities.’ ” [Citation.] That a party who is requesting fees and costs has the resources is not, by itself, a bar to an award of part or all of such party's fees. Financial resources are only one factor to consider. [Citation.] The trial court may also consider the other party's trial tactics. [Citations.] [¶] In summary, the proper legal standard for determining an attorney fee award requires the trial court to determine how to apportion the cost of the proceedings equitably between the parties under their relative circumstances. [Citation.] In making this determination, the trial court has broad discretion in ruling on a motion for fees and costs; we will not reverse absent a showing that no judge could reasonably have made the order, considering all of the evidence viewed most favorably in support of the order. [Citation.]” (*In re Marriage of Falcone & Fyke* (2012) 203 Cal.App.4th 964, 974-975, fn. omitted.)

Section 271, subdivision (a) provides the trial court with authority to order the opposing party to pay attorney fees and costs in the nature of a sanction when “the conduct of each party or attorney . . . frustrates the policy of the law to promote settlement of litigation.” “A sanction order under Family Code section 271 is reviewed under the abuse of discretion standard.” (*In re Marriage of Burgard* (1999) 72 Cal.App.4th 74, 82.)

The November 2017 fee award was based both on the disparity in the parties' income coupled with Flora's ability to pay and Flora's lack of compliance with the judgment. Arthur contended she was not cooperating with the sale of the Hayward property.

The January 2018 fee award also had a dual basis, the disparity in the parties' income and as sanctions under section 271 for frustrating the policy to promote settlement. Arthur claimed Flora did not cooperate with the sale of the Hayward

property, failed to make mortgage payments, and did not vacate the property at close of escrow despite a court order to do so.

Flora contends she did not frustrate settlement because her motion to terminate spousal support was supported by section 4334, which provides a contingent support order terminates upon the happening of the contingency, here the close of escrow on the Hayward property. She ignores, however, that she sought retroactive termination of spousal support and that the court had previously found changed circumstances allowing review of the spousal support.

There is no record of the proceedings on either hearing for attorney fees. Accordingly, we presume the court's findings are supported by the evidence in this judgment roll appeal. (*Williams, supra*, 219 Cal.App.2d at p. 482.) Flora has failed to show an abuse of discretion underlying either fee award.

V

Denial of Request to Terminate Spousal Support

Flora contends the trial court erred in denying her request to terminate Arthur's spousal support once escrow closed on the Hayward property. She argues the close of escrow was a contingent event under section 4334 that should have terminated her duty to provide further support. She contends Arthur continued to accept support, so she was required to file the motion to terminate support.

The court denied the motion to terminate spousal support without explanation. Again, there is no record of the proceedings and we presume the court's findings are supported by the evidence. (*Williams, supra*, 219 Cal.App.2d at p. 482.) The court previously found changed circumstances that allowed a review of spousal support and Arthur requested support of \$750 a month. On appeal, the trial court's decision is presumed to be correct and the appellant has the burden to show error. (*Lafferty v. Wells Fargo Bank, N.A.* (2018) 25 Cal.App.5th 398, 428.) Flora has failed to carry her burden.

DISPOSITION

The judgment is affirmed. Arthur is awarded costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

Duarte, J.

We concur:

/s/
Butz, Acting P. J.

Mauro, J.